United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

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76-1214

To be argued by
JONATHAN MARKS

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1214

UNITED STATES OF AMERICA,

Appellee,

—against—

RONALD ROBINSON,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

ALVIN A. SCHALL,
JONATHAN MARKS,
Assistant United States Attorneys,
Of Counsel.

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Preliminary Statement

Ronald Robinson appeals from a judgment of conviction of the United States District Court for the Eastern District of New York (Bartels, *J.*) entered March 19, 1976, after a jury trial on an indictment (75 Cr. 783) charging him with eight counts of uttering forged United States Treasury checks (18 U.S.C., §§ 495 and 2), eight counts of unlawfully possessing the same eight checks after they were stolen from the mail (18 U.S.C. §§ 1708 and 2), and one count of conspiracy to steal from the mail, possess, forge and utter United States Treasury checks (18 U.S.C. § 371). Robinson was convicted on the conspiracy count, seven of the uttering counts, and seven of the possession counts. The appellant was sentenced to ten years on each of the uttering counts, the sentences to run concurrently with each other, and to

five years on the conspiracy count and each of the possession counts, the sentences to run concurrently with each other but consecutively with the sentences imposed on the uttering counts, for a total of fifteen years imprisonment. Appellant is presently incarcerated and is serving his sentence.

On appeal, appellant raises four issues. He argues first that with respect to the possession counts there was insufficient evidence before the jury to support the finding that the seven Treasury checks were stolen *from the mails.* He further claims that Judge Bartels erroneously instructed the jury in that (1) he removed from its consideration the elements of theft from the mails and and possession under the possession counts, (2) he incorrectly charged on the requirement of intent to defraud under 18 U.S.C. § 495 (the uttering counts) and (3) he improperly included in his charge a diluted "conscious avoidance' instruction.

Statement of Facts

A. The Governments' Case

James Black, Jr., was the Government's chief witness.[1] Through the testimony of Black and other witnesses, the prosecution presented overwhelming evidence of appellant's guilt. The evidence showed that in February 1974, appellant, who owned a liquor store, prevailed upon James Black, Jr., to open with him a small grocery store in Jamaica, New York, as a front for a fencing operation dealing in stolen United States Treasury and New York City welfare checks (24-29).[2] The "business", which was conducted under the name of "New York Boulevard Deli",

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[1] Prior to trial, Black, who was named as a co-defendant with appellant in indictment 75 Cr. 783, pleaded guilty to the conspiracy count.

[2] References are to the trial transcript.

prospered, and from April through August 1974, Robinson and Black purchased at a discount and deposited about $70,000 in stolen welfare and U.S. Treasury checks in two business accounts in the name of New York Boulevard Deli which they opened at the Marine Midland Bank at 89-60 163rd Street, Jamaica, New York, and the National Bank of North America at 205-02 Linden Boulevard, St. Albans, New York.

It was Black who ran the day-to-day operations of the New York Boulevard Deli, buying thousands of dollars in checks but only selling about $40 to $50 worth of groceries per day (31). Robinson established the modus operandi. When a prospective seller of checks came to the store, Black would call Robinson for approval to purchase the checks at one-third of their face value. Such purchases usually exceeded the small amount of cash kept at the store. Accordingly, Black would ask the seller to wait while Black drove the few blocks to Robinson's liquor store to pick up the money with which to buy the checks. Every evening, Black would take the day's purchases of U.S. Treasury and New York City welfare checks to Robinson. About three-quarters of the checks were unendorsed. The following morning Black would return to the liquor store to find every check endorsed. Black would then add the second endorsement of the New York Boulevard Deli and deposit the checks in one of the two accounts used to clear the checks (86-114).

Most of the checks which Black deposited came from sources other than the grocery store, for when Black arrived at the liquor store in the morning he would often find two or three and sometimes as much as ten thousand dollars in checks which he had not left there (89). Every several days, Robinson and Black would prepare a check made payable to cash, in order to withdraw some, but not all, of the proceeds of stolen checks recently de-

posited in the accounts. Black and Robinson would then share the proceeds after deductions for Robinson's business expenses. Of about $70,000 deposited in the two accounts, $67,000 consisted of stolen checks (232-233, 289-295). During the life of the accounts (April-August, 1974) Robinson and Black withdrew most of the money in the accounts (285).

One of the many sellers of Treasury checks to appellant and Black was one Dennis Morgan. Black testified that Robinson told him Morgan was a postal employee and he got the checks from the post office (103-104). Several times in June 1974, Black saw Morgan give Robinson batches of U.S. Treasury checks payable to various payees. Robinson paid Morgan for these checks and put them in his liquor store safe (73).

The Government also introduced in evidence the recording of a conversation between Robinson and John Chappelle, an undercover investigator for the New York City Department of Investigation (Gov. Ex. 49). In the course of that conversation, Robinson admitted that he was running stolen welfare checks through corporate accounts in order to make a fast quarter of a million dollars. In addition, he offered Chappelle a quantity of Treasury checks for resale. The proposed transaction never took place, however.

Also received in evidence were the eight U.S. Treasury checks which formed the bases of the substantive counts in the indictment (Gov. Ex. 7-13, 15). Seven of these checks bore the second endorsement of the New York Boulevard Deli, and each of the checks was deposited in either the Marine Midland or the National Bank of North America account.[3]

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[3] The eighth check, was respect to which the jury acquitted appellant, was deposited in an account in the name of appellant's liquor store.

Theresa Venditti, the payee named on one of the above mentioned Treasury checks, testified that she always received her Social Security checks by mail but that she never received her check for the month of May 1974 (Gov. Ex. 11), which was supposed to arrive at her house by mail in June. Although her name appeared as the first endorser on the back of the check, Mrs. Venditti stated that it was not her signature. Additionally, she testified that, although the check was deposited in an account at the Marine Midland Bank, she did not have an account there (191-192).

Following the testimony of Mrs. Venditti, it was stipulated that each of the other seven payees on the indictment checks, if called, would have testified that he never received the Social Security check made payable to him, that he ordinarily received his Social Security checks by mail, that the endorsement in his name was not in his handwriting, and that he did not maintain an account at the bank in which the check was deposited (194-197).

In addition to the seven United States Treasury checks just described, the Government also placed in evidence, as proof of similar crimes, numerous New York City welfare and United States Treasury checks bearing the second endorsement of the New York Boulevard Deli. Received along with these checks were a large number of checks drawn on the Marine Midland and National Bank of North America accounts, payable to cash and signed by Robinson and Black (Gov. Exs. 14, 4B).

Also testifying for the Government were Luciano Caputo, a handwriting expert, Robert Downes, operations officer for Marine Midland Bank, and Thomas McGlynn, loss control coordinator for the National Bank of North America. Although unable to say that either appellant or Black had forged the endorsements on the eight checks

specified in the indictment, Mr. Caputo was able to testify that some of the endorsements were "unnatural writings" and that several of them appeared to have been written by the same individual (338, 348-349).

Messrs. Downes and McGlynn testified concerning the activity in the New York Boulevard Deli accounts at their respective banks. A number of the Treasury and welfare checks which were deposited with Marine Midland (totaling $45,000) were discovered to contain forged endorsements (232-233). Of the $26,000 (most of which consisted of welfare and Treasury checks) which was deposited in the New York Boulevard Deli account at the National Bank of North America, more than $18,000 was determined to be derived from checks with forged endorsements (289).

B. The Defence Case

Robinson testified in his own behalf. In substance, he testified that he had no idea that any of the subject checks, let alone forged ones, had been deposited in the New York Boulevard Deli accounts. He conceded, however, that he withdrew money from the accounts and that he had signed the signature cards to open the accounts. On cross-examination, he first denied and then admitted that he had used the name James Brown to open five additional bank accounts. He could not recall from whom he had received a sixty-five hundred dollar Treasury check payable to Garland A. Moore which was deposited in his personal account at European-American Bank.

The defense called no other witnesses.

ARGUMENT

POINT I

The Government's proof was sufficient to sustain an inference that the checks were stolen from the mail.

Appellant asserts that the Government's proof was insufficient to establish that the United States Treasury checks referred to in the possession counts on which appellant was convicted were stolen from the mail. Consequently, so the argument goes, the possession counts must be dismissed and appellant resentenced on the conspiracy count. These claims are without merit.

We submit that the evidence required under § 1708 to prove that stolen matter was taken from the mail may be direct or circumstantial. And, in this regard, circumstantial evidence is entitled to the same weight and probative value as direct proof. *See, e.g., United States* v. *Dobson*, 512 F.2d 615 (6th Cir. 1975), *United States* v. *Bowles*, 428 F.2d 592, 597 (2d Cir. 1970), *cert. denied*, 400 U.S. 928 (1970). Indeed, as a general rule, it is settled that circumstantial proof by itself may be sufficient to sustain a conviction. *United States* v. *Glasser*, 443 F.2d 994, 1006-07 (2d Cir. 1971), *cert. denied*, 404 U.S. 854 (1971).

Viewing the evidence in the light most favorable to the Government (*Glasser* v. *United States*, 315 U.S. 60, 80 (1942)) it is clear that in this case the proof was sufficient to sustain an inference that the checks were, indeed, stolen from the mails. Thus, Theresa Venditti testified that she never received the Social Security check made payable to her that was deposited in the New York Boulevard Deli account, that the endorsement was forged, and that she always received her Social Security checks

through the mail (Statement of Facts, *supra*, at p. 5). Similarly, it was stipulated that if the payees on the other seven checks had been called, each would have testified that he generally received his Social Security checks by mail, that he never received the check made payable to him mntioned in the indictment, that the endorsement was forged, and that he did not have an account in the bank where the check was deposited.

Moreover, as indicated on their face, all but one of the Treasury checks named in the possession counts were issued by disbursement offices outside the State of New York.[4] At the same time, however, the checks were all addressed to payees within the Eastern District. We submit that this combination of facts further supports the inference that the checks were stolen from the mail. For the only way the seven checks could have been stolen, but not from the mail, and still have arrived in the Eastern District would have been for them to have been taken from the separate disbursing offices and then transported individually to the New York Boulevard Deli. This is a most unlikely possibility. Indeed, it is largely refuted by the testimony of Black that one of the purveyors of stolen checks was a postal employee who had stolen the checks from the post office.[5]

Appellant's reliance on *Giraud* v. *United States*, 348 F.2d 820 (9th Cir. 1965), *cert. denied*, 382 U.S. 1075 (1966), is misplaced. In *Giraud*, a panel of the Ninth Circuit held only that certain specific circumstantial proof was insufficient to establish mailing, without detailing what that proof consisted of. *Giraud* does not, as appel-

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[4] Birmingham, Alabama; Philadelphia, Pennsylvania; Chicago, Illinois.

[5] Counsel stipulated that two other Treasury checks which were deposited in a New York Boulevard Deli account were stolen from the mail (548).

lant contends, stand for the proposition that there must be testimony of mailing by the sender. Indeed, in *United States* v. *Dobson*, *supra*, the Sixth Circuit Court of Appeals affirmed a conviction under 18 U.S.C. § 1708 where, as here, it was stipulated that the checks were stolen and that the payees did not know the defendant and, there was no direct proof of mailing.

Finally, appellant contends that if his convictions on the possession counts are reversed, he should be resentenced on the conspiracy charge. We disagree. Even assuming *arguendo* that appellant was correct on his sufficiency argument, it would hardly follow that he would be entitled to resentencing under the conspiracy conviction. The reason is clear. The conspiracy is an entirely separate offense from the substantive charge. *Pereira* v. *United States*, 347 U.S. 1, 11 (1954). Moreover, the conspiracy count in this indictment charged the defendant with conspiracy to forge and utter United States Treasury checks (18 U.S.C. § 495), as well as conspiracy to possess stolen mail (18 U.S.C. § 1708). In addition, as outlined above, appellant was sentenced to ten years on each of the Section 495 counts, to run concurrently, to five years on each of the Section 1708 counts, and five years on the conspiracy count, the 1708 and conspiracy counts to run concurrently with each other, but consecutively with the ten year counts, for a total of fifteen years. Thus, even if the 1708 counts were dismissed, the five years imprisonment imposed on the conspiracy count would still run consecutively with the other remaining counts. There would clearly be no reason to remand the case for resentencing. But see, *United States* v. *Barash*, 365 F.2d 395, 399 (2d Cir. 1966).

POINT II

The Court's charge on possession was proper and did not constitute plain error.

The appellant made no requests to charge or objections to the trial court's charge. He now asserts for the first time, relying primarily on *United States* v. *Singleton*, 532 F.2d 199 (2d Cir. 1976), that the court committed plain error by confusing and removing the issues of possession and theft from the mail from the jury's consideration in determining the ultimate issue of appellant's guilt under 18 U.S.C. § 1708. As we show below, Judge Bartels' charge was entirely proper and did not remove any of the elements of the crime from the jury's considerations.

Appellant first argues that the district court erred in charging the jury as follows:

> Now the elements of the offense as charged in these counts of the indictment are one, the unlawful possession of an article, such as a check, stolen from the United States mail, and, two, knowledge that the article, such as a check, was stolen from the United States mail (590).

Appellant's objection appears to be to the fact that Judge Bartels used two rather than three item numbers in articulating the elements. However, when viewed in the context of the charge as a whole, it is apparent that the instruction complained of does not even rise to the level of harmless error, much less plain error requiring reversal under *United States* v. *Fields*, 466 F.2d 119 (2d Cir. 1972).

Thus, before giving the portion of the charge complained of here, Judge Bartels read two of the possession

counts (18 U.S.C. § 1708) from the indictment (580-583), twice read the statute itself (588-590), and gave the following explanation:

> Count seven covers the same check. [T]hat charges a violation of a different statute. That depends upon having in *possession* that check of which the contents were *stolen from the United States mails* (583; emphasis added).

In order to articulate even more clearly the elements under the statute, the court then gave the following explanation immdiately following the disputed instruction:

> In order to find the defendant guilty under this statute, it is sufficient that you find, beyond a reasonable doubt, that the defendant *unlawfully had in his possession anything stolen from the United States mail, such as a check, knowing the same to have been stolen* (590-591; emphasis added).

Appellant's argument is nothing more than an attempt to place form over substance. The plain fact is that Judge Bartels instructed the jury that in order to convict it had to find beyond a reasonable doubt that appellant possessed matter stolen from the United States mail, knowing it had been stolen. This is all that was required.

Appellant further argues that the court erred in "directly taking the issue of whether the checks were stolen from the mails from the jury and implicitly directing a verdict on the possession count." (Appellant's brief at 23). The claim is apparently based on the following statement by Judge Bartels:

> I think I might say if I am not mistaken that as to the checks covered by the counts two through seventeen inclusive, I think it was stipulated that

> those checks were stolen, and the endorsements thereon were forged. It was definitely stipulated, so, the real question is their [sic] knowledge (602).

The short answer to appellant's argument is that the court was "not mistaken." It was stipulated that if the payees had been called they would have testified that they never received the checks addressed to them and specified in the indictment, that ordinarily they would have received them by mail, and that they did not write the endorsement appearing on the back of each check (Statement of Facts, *supra*, at 5). It was, therefore, quite accurate for the court to state that it was stipulated that he checks were stolen. That inference was, in fact, compelled by the terms of the stipulation. *Cf United States* v. *Singleton*, *supra*, 532 F.2d at 206. Indeed, Robinson's trial counsel agreed with that characterization of the stipulation during his summation following his erroneous comment that Black's testimony was the only evidence that the checks were stolen:

> Mr. Marks: Objection, there is a stipulation.
> Mr. Coiro: That they were stolen.
> The Court: And forged.
> Mr. Coiro: And forged (543).

Since there was also no dispute over the fact that the checks were deposited in the New York Boulevard Deli accounts on which appellant was a signatory, the district judge was clearly accurate in instructing the jury that "the real question is their [sic] knowledge." The court's remark was fair comment designed to focus the jury's attention on the only element that was in real dispute. Moreover, Judge Bartels made it clear to the members of the jury that they alone had the responsibility of determining the facts at issue in the case (571, 576, 603, 616). *See, United States* v. *Natale*, 526 F.2d 1160, 1167 (2d Cir. 1975).

Appellant's reliance on *United States* v. *Singleton*, *supra*, 532 F.2d 199, is misplaced. There, this Court expressly declined to find plain error "simply because the district court failed to charge separately and specifically that the checks must be stolen for the offense to have been committed." 532 F.2d at 206. Thus, the issue with respect to Judge Bartels' enumeration of the elements under two rather than three item numbers was resolved in *Singleton* in the Government's favor.

However, the Singleton Court did find that the charge as a whole led the jury to the conclusion that it did not have to consider the issue of whether or not the checks were stolen from the mails inasmuch as the trial court, in discussing the issue of knowledge, commented that "[f]rom the circumstance of this case, it would seem clear that the property that [sic], these checks, were recently stolen." *Id.* Here, as distinguished from *Singleton*, the court did nothing more than state the essence of the stipulation. Moreover, by repeating numerous times throughout the charge, as indicated above, that the jury had to find that the Government had sustained its burden of proof beyond a reasonable doubt on every element of the offense charged, Judge Bartels insured that the jury was advised of its duty to consider each element, including the issues of possession and whether or not the checks were stolen from the mails.

POINT III

Judge Bartels properly instructed the jury on intent.

On the basis of language taken from the charge out of context, appellant argues, erroneously, that the trial court charged the jury that it did not have to find specific intent with respect to each of the elements of the crimes

charged. As the record makes clear, such is not the case. The jury was instructed that it had to find specific intent in order to convict appellant. The trial court first charged the jury that the Government must prove each element of the crimes charged beyond a reasonable doubt (588, 591). It then instructed the jury as follows:

> Now you have heard me refer to the fact that knowledge and intent was necessary for conviction. Now to be found guilty in this case you must find the defendant Ronald Robinson had possession of stolen checks, stolen checks from the mail and that as to certain counts of the indictment he knew the checks were stolen and as to other counts of the indictment he knew that the payees' names were forged.
>
> * * * * *
>
> . . . knowledge and intent may be inferred from the acts of the party and it is a question of fact to be determined from all the circumstances, and the jury may scrutinized the defendant's entire conduct at the time the offenses alleged were committed. . . .
>
> The circumstantial evidence sufficient to support a charge of knowledge and intent to possess stolen United States Treasury checks or to negotiate them, issue, utter United States Treasury checks with forged endorsements thereon must be sufficiently persuasive, however, as to exclude the inferences of innocence under the circumstances (606-607).

Judge Bartels then charged the jury with respect to the requirement that the Government prove an intent to defraud the United States under 18 U.S.C. § 495. It was only in that context that the court quite properly gave the "natural and probable consequences" charge

quoted at page 29 of appellant's brief. Indeed, this charge was not given until the jury had first been instructed as follow:

> While the defendant must have knowledge that the check was forged, it is not necessary that he intended to defraud a particular person as long as he has the intent that the check had been cashed or passed or used as true and [sic] a genuine check, although in actuality, it was forged. (608).

It is apparent from the record, as it was to the jury, that the instruction complained of referred to the requirement under the uttering counts (18 U.S.C., § 495) of a showing of an intent to defraud the United States, which need not be specifically proved. Moreover, the "natural and probable consequences" charge was a proper expression of the law. *United States* v. *Sullivan*, 406 F.2d 180, 187 (2d Cir. 1969).

Appellant's reliance on *United States* v. *Barash*, 365 F.2d 395 (2d Cir. 1966), is misplaced. In *Barash*, the panel reversed where a "natural and probable consequences" charge tended to mislead the jury as to the showing required on intent to influence an Internal Revenue official in a bribery case. Here, the charge was properly given in order to instruct the jury as to the requirement of proving intent to defraud the United States, an intent which need not be specifically proved. In addition, it is significant that in *Barash*, unlike this case, an exception was taken to the charge at trial. 365 F.2d at 402 n. 9. Consequently, in order for the charge to constitute a ground for reversal, it must be found to have been so improper in the context of the case as "to be plain error affecting substantial rights" of appellant. *United States* v. *Rosenthal*, 470 F.2d 837, 843-844 (2d Cir.), *cert. denied*, 412 U.S. 909 (1972). Judge Bartels' charge was hardly plain error. Indeed, it was entirely correct.

Finally, appellant can gain no comfort from *United States* v. *Bertolotti*, 529 F.2d 149 (2d Cir. 1975), on which he relies. In that case, the defendants were convicted of conspiring to violate the federal narcotics laws. The trial court charged the jury that, in determining whether defendants had the requisite knowledge, wilfulness and intent, the jurors "should presume that a person intends the natural and probable consequences of his acts." Without determining whether the charges constituted reversible error, the panel warned against its use where a conspiracy is charged. 529 F.2d at 149. Thus, *Bertolotti* is not applicable to the circumstances of this case in which the district court gave a "natural and probable consequences" charge on an issue as to which specific intent need not be proved. *United States* v. *Sullivan*, *supra*, 406 F.2d 180.

POINT IV

Judge Bartels properly instructed the jury on knowledge.

At the trial, the court instructed the jury, *inter alia*:

> "Knowledge," as well as "intent," is descriptive of a state of mind, and as an element of the offense is seldom, if ever, susceptible of direct proof. The proof of this element of knowledge and intent may rest, as it frequently does, on evidence of facts and circumstances from which it clearly appears as the only reasonable and logical inference that the accused had knowledge of the illegal possession of the United States Treasury checks or that the accused had knowledge that the endorsement's on the checks were forged.
>
> But in determining knowledge or intent you must consider his intelligence or sophistication or lack of intelligence and sophistication. No person

can intentionally avoid knowledge by closing his eyes to the facts that would lead a reasonable man to investigate. However, a mere suspicion that something is wrong or improper is not equivalent to knowledge or intent.

On the other hand, knowledge and intent may be inferred from the acts of the party and it is a question of fact to be determined from all the circumstances, and the jury may scrutinize the defendant's entire conduct at the time the offenses alleged were committed.

No person can disclaim knowledge merely by closing his eyes intentionally to facts which would otherwise have been obvious to a reasonable man. The circumstantial evidence sufficient to support a charge of knowledge and intent to possess stolen United States Treasury checks or to negotiate them, issue, utter United States Treasury checks with forged endorsements thereon must be sufficiently persuasive, however, as to exclude the inference of innocence under the circumstances.

Of course we can seldom look inside a person's mind. It is impossible as you know to do that. So we must depend upon circumstances surrounding his conduct. (605-608; emphasis added.)

We note at the outset that appellant voiced no objection to this charge when it was given. Thus, reversal is only warranted if the instruction is found to have constituted plain error. *United States* v. *Rosenthal, supra,* 470 F.2d at 843-844. As we show below, it was not error of any sort.

To begin with, contrary to the claims of appellant, the instruction was clearly warranted by the evidence before the jury. Black testified that it was appellant

who devised and directed the scheme for the check fencing operation. Appellant then took the stand in his own behalf and denied that he had ever conspired with Black. Coupled with this was evidence presented by the Government that Robinson and Black opened the New York Boulevard Deli together, that both opened checking accounts at the Marine Midland Bank and the National Bank of North America in the name of the New York Boulevard Deli, that both signed checks totalling tens of thousands of dollars by which money was withdrawn from those accounts, and that Robinson himself received substantial sums of cash withdrawn from the accounts. Robinson conceded all of these facts, but he claimed that Black made all of the deposits to the accounts and that he had no knowledge of the nature of the deposits, which consisted of stolen United States Treasury and New York City welfare checks (443-445). In the circumstances, Robinson's claim that he was unaware that stolen checks were passing through bank accounts over which he had control amply warranted the giving of the diluted "conscious avoidance" charge. As this Court stated in *United States* v. *Sarantos*, 455 F.2d 877 (2d Cir. 1972), the purpose of the "conscious avoidance" charge is

> to prevent an individual like [appellant] from circumventing criminal sanctions merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct.

455 F.2d at 881.

Moreover, there was no error in the language of the charge given by Judge Bartels. Indeed the instruction, as quoted above, was less favorable to the Government than the charges approved by this Court in *United States* v. *Abrams*, 427 F.2d 86, 91 (2d Cir.), *cert. denied*, 400 U.S. 832 (1970), and *United States* v. *Sarantos*, *supra*, 453 F.2d at 880. In addition, Judge Bartels did not, as

appellant suggests, give the kind of charge which was condemned by this Court in *United States* v. *Bright*, 517, F.2d 584 (2d Cir. 1975). In *Bright*, which also involved a violation of § 1708, the jury was erroneously instructed that it could find the requisite knowledge if it found that the defendant had acted with "*reckless disregard* . . . but with a conscious effort to avoid learning the truth, *even though* [*the defendant*] *was not specifically aware of the fact, which would establish the stolen character of the checks.*" (Emphasis added). *Id.* at 588. No such instruction was given here.[6]

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[6] Appellant further argues that the district court's instruction on "knowledge" had the effect of misleading the jury as to the Government's burden of proof beyond a reasonable doubt. There is no basis for such a conclusion in view of the numerous reminders to the jury throughout the charge of the nature of the Government's burden of proof (572-576, 587-588, 591, 620-621).

Specifically, on the issue of "knowledge", Judge Bartels charged as follows:

> You will notice in both cases I emphasized the fact that the defendant must know that either the check was forged under the first statute or he must know that the check was stolen under the same, under the second statute.
>
> The burden is upon the Government to prove, *beyond a reasonable doubt,* these two elements, and failure to do so is fatal to the prosecution and entitles the defendant to a verdict of acquittal under these counts (591; emphasis added).

CONCLUSION

For the reasons set forth above, the judgment of conviction should be affirmed in all respects.

August 23, 1976.

Respectfully submitted,

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* The United States Attorney's Office acknowledges the assistance of Karen Clegg, a third year law student at New York University, in this brief's preparation.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 26th day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, ~~a~~ two copies of the Corrected Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

David J. Gottlieb, Esq.
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, N. Y. 10007

Sworn to before me this
26th day of August, 1976

Carolyn N. Johnson

CAROLYN N. JOHNSON
NOTARY PUBLIC, State of New York
No. 41-4513298
Qualified in Queens County
Term Expires March 30, 1977

Lydia Fernandez

LYDIA FERNANDEZ